FILE COPY

Office - Supreme Court, U
FILED
MAR 6 1950
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 614

IN THE MATTER OF
STANDARD COAL MINING & CONVERTERS CORPORATION,

BANKRUPT.

RALPH M. BROCK

Petitioner.

vs.

ROBERT C. SOLOMON, TRUSTEE, ETC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

HARRY J. MYERSON,
33 N. La Salle Street,
Chicago 2, Illinois,

LESLIE G. PEFFERLE,
428 Reisch Building,
Springfield, Illinois,
Counsel for Respondent, Robert C. Solomon, Trustee, etc.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Statement	1
Argument	4

Table of Authorities.

Maggio v. Zeitz, 333 U. S. 56, 75	4, 5
Federal Rules of Civil Procedure, Rule 52 (a)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 614.

IN THE MATTER OF
STANDARD COAL MINING & CONVERTERS CORPORATION,

BANKRUPT.

RALPH M. BROCK

Petitioner,

vs.

ROBERT C. SOLOMON, TRUSTEE, ETC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

STATEMENT.

Respondent directs attention to the following inaccuracies in Petitioner's Statement.

Page 3, Paragraph 3: The hearing before Judge Briggle is erroneously stated as March 28, 1948, instead of March 28, 1949.

Page 4, Paragraph 2: The statement to the effect that Petitioner "was not permitted to show that the money he

is accused of withholding was spent'' is not supported by the record.

Petitioner was the President of the Bankrupt Corporation. He controlled and dominated its affairs and the funds were under his direction and supervision.

On May 10, 1947, the very day the Receiver was appointed for the Bankrupt Company, he wrongfully abstracted from the bank the moneys which belonged to, and were the property of this estate, and which funds should have been forthwith turned over to the Receiver. No evidence was offered by petitioner to show that any disposition was made by him of the specific money which the Court found was in his possession. He was afforded full opportunity to do so.

Petitioner was interrogated by his counsel, the counsel for the Trustee and the Court. Counsel for the Trustee and the Court attempted in vain to secure from Petitioner answers to questions propounded to him pertaining to his property. The responses were foreign to the questions propounded and were obviously intended to be evasive.

On the very day (May 10, 1947) the Receiver was appointed, Petitioner, appropriated to his own use the sum of $13,500.00 in cash. Petitioner testified that on that day he owned a residence at Arlington Heights which he had purchased for $20,000 (T. 44), a New Buick Roadmaster Sedan Automobile (T. 48, 49, 50), and four service gasoline stations in Chicago (T. 48). On the day that he filed his answer to the Trustee's petition for a turn-over order, February 27, 1949, he transferred his residence to Sheldon Floyd, in trust, who transferred it to the Liberty National Bank, in trust (T. 46). He did not know whether certain mortgages were placed on the property before or after bankruptcy (T. 47). After the bankruptcy, he formed

separate Corporations for each gasoline station, to whom he transferred the properties (T. 48, 49). One of the stations had been owned by Petitioner and Pfundstein since 1938 (T. 49). He did not know whether Pfundstein was related to Henry E. Becker (T. 48).

Standard Coal Mining & Converters Corporation was incorporated November 16, 1942, for the purpose of engaging in the coal mining business. In the Fall of 1946, it engaged in another venture. It solicited and received cash deposits of approximately $350,000 for the sale of steel. No steel was delivered and the deposits were not returned. All of the money was retained, and the persons who deposited their money and received nothing therefor constitute a portion of its creditors (T. 20).

ARGUMENT.

Respondent opposes the Petition. There are no special or important reasons specified in the Petition as are required by Rule 38 (5) of this Court.

The Petition appears to be based upon the contention that the decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Maggio* v. *Zeitz*, 333 U. S. 56.

We wish to point out that the decision of the Circuit Court of Appeals is in accord with the opinion of this Court in the *Maggio* case. This Court in the *Maggio* case said (333 U. S. at p. 75):

> "the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession."

This Court further held in the *Maggio* case that the Bankrupt did not meet this issue "by his own denials which the Court finds incredible in context."

The Circuit Court of Appeals with respect to the testimony of Petitioner states:

> "In many respects their testimony was vague, uncertain and unsatisfactory, especially as to the exact nature and amount of assets formerly owned by each of them. The trial Judge had the opportunity to observe appellants upon the witness stand and we must accept his judgment as to their credibility. The Court announced he was convinced beyond a reasonable doubt that Brock and Becker knowingly and wilfully failed

to comply with the Referee's turn-over order. He made findings that on August 31, 1948, the date of the turn-over order, Brock had in his possession $17,500.00." (T. .....)

The Court further stated:

"Under the state of the record, as we find it before us, sufficient evidence sustains the trial court's finding, and we must affirm its judgment, but that does not mean that Brock and Becker must necessarily spend the rest of their days in jail if they are never able to comply with the turn-over order. We have progressed considerably from the time when imprisonment for debt was commonplace. After a reasonable interval has elapsed, Brock and Becker may again seek to show the court their inability to comply with the turn-over order. *Maggio* v. *Zeitz, supra,* p. 72. On such a hearing, they should be prepared to make definite and accurate answers as to what was done with the assets formerly owned by the bankrupt and transferred to them, as well as their own assets." (T. .....)

Under the decision of the Circuit Court of Appeals, Petitioner is afforded a full opportunity to show by credible evidence that he is unable to comply with the turn-over order. The Court further said:

"If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail 'until he shall purge himself of his said contempt' should be modified, or the commitment vacated, and Brock and Becker released. But until such time, the order shall stand and it is hereby AFFIRMED." (T. .....)

The rules of law laid down in the opinion of the Circuit Court of Appeals are based upon and in accord with the principle asserted by this Court in the *Maggio* case.

No explanation was made by Petitioner as to what disposition he made of the funds which he wrongfully appropriated on the day and immediately preceding the filing of the petition in bankruptcy and which were in *custodia legis,* and should have been turned over to the Receiver. To merely state he does not have the funds does not end the controversy.

Rule 52 (a) of the Federal Rules of Civil Procedure provides among other things:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the trial court to judge of the credibility of the witnesses."

To no type of case is this last clause more appropriately applicable than to the one herein, where the evidence of Petitioner is evasive and incredible, deliberately staged to conceal his present holdings and property and to give the false impression that the money withdrawn from the bank on the day the Receiver was appointed was dissipated and is not now in his possession.

No "presumption" need be indulged in and no resort to "fiction" is required to visualize that on the day the Receiver was appointed the Petitioner withdrew all of the funds from the bank, $13,500.00 which belonged to, and was the property of the Receiver, and should have been turned over to the Receiver.

No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement that they are not in his possession. He had ample opportunity to show his inability to comply with the turn-over order. No showing was made.

The Circuit Court of Appeals has afforded Petitioner

the opportunity to show his inability to comply with the turn-over order. Petitioner, however, has chosen to conduct a series of extensive and expensive hearings and defenses in his efforts to avoid an accounting of the funds withdrawn by him.

Imprisonment to compel obedience to a lawful judicial order has not yet ceased, and ought not to cease. To hold otherwise would destroy all respect for the Courts by stripping them of power to enforce their lawful decrees. Such power is inherent in all Courts.

A copy of the record has not been served upon respondent as required by Rule 38 (3). Counsel for Petitioner has failed on request to supply Respondent with such copy. Respondent is therefor unable to supply page references to that portion of the record consisting of the opinion of the Circuit Court of Appeals.

The findings of the Referee, affirmed by the learned Judge, discrediting the excuses offered, and affirmed by the Circuit Court of Appeals require the acceptance by this Court of the conclusions reached by the Referee, the Judge, and the Circuit Court of Appeals.

The grounds presented in support of the Petition are clearly without merit and the Petition should be denied.

Respectfully submitted,

HARRY J. MYERSON and
LESLIE G. PEFFERLE,
Attorneys for Respondent, Robert C. Solomon, Trustee, etc.